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State v. Macklin Respondent's Brief Dckt. 43623

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ROBERT SCOTT MACKLIN, Defendant-Appellant.	)	NO. 43623 Twin Falls County Case No. CR-2014-7737 RESPONDENT'S BRIEF

Issue

Has Macklin failed to establish that the district court abused its discretion, either by revoking his probation, or by denying his Rule 35 motion for reduction of his five-year fixed sentence, imposed following his guilty plea to grand theft?

Macklin Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Macklin pled guilty to grand theft and, on February 23, 2015, the district court imposed a sentence of five years fixed, suspended the sentence, and placed Macklin on supervised probation for four years. (R., pp.116-27.) Less than four months later, the

state filed a motion to revoke probation alleging Macklin had violated the conditions of his probation by admitting to using methamphetamine on March 28, 2015, testing positive for methamphetamine four separate times in April 2015 and three separate times in May 2015, driving without privileges and being involved in a car accident, being fired from his job for missing work continuously and testing positive for methamphetamine, and failing to report for supervision. (R., pp.135-41.) Macklin admitted the allegations and the district court revoked his probation and ordered the underlying sentence executed. (R., pp.161, 188-92.) Macklin filed a notice of appeal timely from the district court's order revoking probation. (R., pp.199-202.) He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.193-98, 211-14.)

Macklin asserts that the district court abused its discretion by revoking his probation in light of his substance abuse, community support, and his claim that the district court did not perceive the issue of whether to revoke his probation as one of discretion because it followed through on its promise to revoke probation if Macklin violated. (Appellant's brief, pp.3-6.) Macklin has failed to establish an abuse of discretion.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to revoke probation lies within the sound discretion of the district court. State v. Roy, 113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When deciding whether to revoke probation, the district court must consider "whether the probation [was] achieving

the goal of rehabilitation and [was] consistent with the protection of society." Drennen, 122 Idaho at 1022, 842 P.2d at 701.

Macklin is not an appropriate candidate for probation. He has a lengthy criminal history that includes convictions for violation of a no contact order, felony theft by unauthorized control, possession of drug paraphernalia, felony possession of a controlled substance, and two convictions for manufacture/deliver/possession of a controlled substance with intent. (PSI, pp.5-7.) Macklin also has a history of failing to comply with court orders and the terms of community supervision. (PSI, pp.5-6, 8.) He was placed on felony probation in 2003, and repeatedly violated by testing positive for methamphetamine, being untruthful, being unsuccessfully discharged from treatment programs, and failing to submit to drug testing. (PSI, p.8.)

At the time of sentencing for the instant offense (in February 2015), Macklin, age 53, reported that he used methamphetamine daily from age 28 until the summer of 2014. (PSI, p.14.) Despite this, he claimed that he did not need substance abuse treatment. (GRSS, p.2.) The district court granted Macklin one "last chance" (9/15/15 Tr., p.11, Ls.13-14) at probation in this case, specifically warning him that "this would be a zero tolerance probation" (9/15/15 Tr., p.6, Ls.13-17) and that he "had one shot of staying out of prison" (9/15/15 Tr., p.6, Ls.4-8). Macklin did not take his final opportunity at probation seriously; upon reporting to Probation and Parole for his "initial sign up," he admitted to being under the influence of methamphetamine and that he had driven without privileges and been involved in a car accident. (R., p.131.) Over the following two months, Macklin repeatedly tested positive for methamphetamine, lied to his probation officer about his methamphetamine use, was fired from his job for

continuously missing work and testing positive for methamphetamine, and failed to report for supervision. (R., p.131.) He was placed in substance abuse treatment; however, his treatment provider reported that "Macklin should be progressing after a month of treatment, but appears to be getting worse" and he "is not applying the tools that have been taught to him to cope with his substance abuse." (R., p.131.)

At the disposition hearing for Macklin's probation violation, the district court noted Macklin had a lengthy criminal history that included crimes that have negatively affected the community and that, despite the court having warned him that it was his last chance on probation, he "[c]ontinued to use and continued to use and continued to use and continued to violate." (9/15/15 Tr., p.11, L.13 – p.12, L.5.) The district court's decision to follow through with its previously stated consequences is not tantamount to the court failing to perceive its discretion, particularly where, as here, the revocation of probation was necessary to achieve the goals of protection of society and rehabilitation. Probation was clearly not serving the purpose of rehabilitation in this case, as evinced by Macklin's ongoing and escalating substance abuse and the fact that he appeared to be "getting worse," rather than making any progress in treatment. Neither was probation achieving the goal of community protection, given Macklin's continued criminal conduct and refusal to comply with the terms of community supervision.

The district court did not fail to perceive the issue of whether to revoke Macklin's probation as one of discretion, but instead considered all of the relevant information and concluded, "I find probation has not served its intended purpose. Your history does not justify placement in drug court." (9/15/15 Tr., p.12, Ls.13-15.) Macklin's continued criminal behavior, his refusal to comply with the conditions of community supervision,

and his failure to make any rehabilitative progress while in the community did not merit continued probation. Given any reasonable view of the facts, Macklin has failed to establish that the district court abused its discretion by revoking his probation.

Macklin next asserts the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence. (Appellant's brief, pp.6-7.) In State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007), the Idaho Supreme Court observed that a Rule 35 motion "does not function as an appeal of a sentence." The Court noted that where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. Id. Thus, "[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Absent the presentation of new evidence, "[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence." Id. Accord State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008).

Macklin did not appeal the judgment of conviction in this case. In support of his Rule 35 motion, Macklin merely reminded the court that he had a five-year fixed sentence, that he had only one probation violation in this case, that his probation officer had requested discretionary jail time as opposed to a probation violation, and that Macklin was given a notice of eligibility to drug court. (R., p.193.) None of this was "new" information, as the district court was aware of all of these things at the time that it revoked probation. (R., pp.116-22, 130-31, 182-84.) Because Macklin presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed

to establish any basis for reversal of the district court's order denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm the district court's orders revoking probation and denying Macklin's Rule 35 motion for a reduction of sentence.

DATED this 13th day of April, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of April, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General